SUPREME COURT, U. S.

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No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1968

DAVID LEE WILLIAMS, TERRY DONALD MARTIN AND DONNA LEE COOK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of violating the federal kidnapping statute, 18 U.S.C. 1201(a). On March 4, 1966, petitioners Williams and Martin were sentenced to imprisonment for twenty years; petitioner Cook received a sentence of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

The victim of the abduction was a nineteen-year-old divorcee, Carol Ann McGill, who resided with her

children at her grandparents' home in Port Arthur, Texas (Tr. 62-64).[1] She met petitioner Williams while working in a local tavern. In early September 1965, she went to live with Williams in Houston and learned that he was a procurer for prostitutes. Williams prevailed upon Mrs. McGill to work for him. For the next few months, except for a period when she was incapacitated because of major surgery, she worked for Williams in various locations in Texas and Louisiana (Tr. 73-76). On one occasion when she decided to return home, Williams followed her. After being threatened and struck by Williams, Mrs. McGill decided to return with him to New Orleans (Tr. 76-79). For two weeks she worked for Williams in a brothel in Port Barre, Louisiana (Tr. 79). Then she was taken to New Orleans, where she lived with the three petitioners in an apartment rented by petitioner Martin (Tr. 80).

On December 25, 1965, Mrs. McGill prevailed upon Williams to drive her to her grandparents' home for the holidays. Once there, she feigned illness. When Williams decided to return to New Orleans, she promised that she would rejoin him in a few days, but said that she had to remain behind to see a doctor (Tr. 84). During the next few days, she spoke to Williams several times by telephone, each time indicating that she desired to remain in Port Arthur for a while longer, and refusing demands by Williams that she return to work (Tr. 85-86).

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[1] The one-volume transcript of trial has been filed with the Clerk of this Court.

In the early morning hours of January 1, 1966, the three petitioners drove in Martin's automobile to the home of the grandparents. In order to gain entry into the house, Williams cut the screens of the doors to the front porch and the house. Inside he learned from Mrs. McGill's grandmother, Mrs. Mansfield, that Mrs. McGill was asleep on a living room couch. Williams lifted her from the couch and attempted to carry her to the car (Tr. 42, 52). Mrs. McGill awoke and began screaming. The cries aroused Mr. Mansfield, who heard her scream, "Grandpa, don't let him take me out of here. They will kill me." (Tr. 52-53.) He tried to stop Williams, but was pushed aside. Williams called on petitioner Martin to assist him (Tr. 53, 88). Martin opened the front gate, and Williams threw Mrs. McGill onto the rear seat of the car (Tr. 90). They proceeded by a circuitous route to Martin's apartment in New Orleans. Both Martin and Miss Cook drove the vehicle (Tr. 94). On the way, Williams beat Mrs. McGill and threatened to kill her. At one point he put a gun to her head, but heeded Martin's advice to calm down (Tr. 88-90). In Deweyville, Texas, Mrs. McGill was compelled to make a collect telephone call to her grandparents and to tell them that she was safe (Tr. 47, 92-93).

They arrived at the New Orleans apartment at 7:30 a.m. on January 1. All three petitioners had been drinking along the way. Williams forced Mrs. McGill to have relations with him, and then fell asleep. When the others had gone to sleep, Mrs. McGill sneaked out of the apartment and obtained help. A neighbor took her to the police station, where she

gave an account of her abduction to State police officers. At approximately 9 a.m., petitioners were arrested at the apartment.[2] The arresting officers received Martin's permission to search his car. In it they found a bloodstained pajama top which Mrs. McGill had worn and other bloodied rags and tissues (Tr. 139, 152). Two days later, when Mrs. McGill was examined by a doctor, she still had bruises under both eyes and on the bridge of her nose, caused by the beatings (Tr. 188-189).

1. After their arrest in Louisiana, petitioners were returned to Texas.[3] Williams was incarcerated in the Jefferson County prison, where deputy sheriff Curnan was employed as a fingerprint technician (Tr. 158). During the routine fingerprinting of Williams, Curnan asked him his name, vital statistics and occupation. To the latter question, Williams replied that he was a "pimp" (Tr. 158-159, reprinted in full at Pet. 5-7). Citing *Jackson* v. *Denno*, 378 U.S. 368, petitioners allege that the admission of Williams' statement was reversible error, because the trial judge had failed to conduct a preliminary hearing outside the presence of the jury on the voluntariness of the admission.

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[2] Petitioner Williams was arrested outside the apartment house after he had departed through a rear sliding glass door and had thrown Mrs. McGill's purse into some shrubbery (Tr. 139).

[3] The transcript of the removal proceedings has been filed with the Clerk of this Court. At the hearing, petitioners were represented by the same counsel who represented them at trial.

The failure to conduct such a hearing does not, in the circumstances, constitute reversible error. Until the testimony regarding Williams' occupation was adduced, there was nothing to indicate that voluntariness was an issue. The evidence that Williams' admission was freely given during routine questioning by an employee performing the ministerial duty of fingerprinting was not disputed. This was not a situation involving custodial interrogation for the purpose of eliciting incriminating evidence or a situation where a "confession" might credibly have been tainted because of the failure of a police officer to advise Williams of his rights.[4] The petition for a writ of certiorari contains nothing to indicate that Williams' statement was other than a spontaneous reply to the fingerprinter. The only reference to a possible claim of involuntariness is a comment that at the time the statement was made Williams had been in custody for a month awaiting trial (Pet. 15); this does not raise a credible issue of coercion.

Jackson v. *Denno* requires the court to make a determination of disputed facts regarding the voluntariness of a defendant's statement before the jury may consider it. That determination need not invariably be made at a preliminary hearing outside the presence of the jury. *Pinto* v. *Pierce*, 389 U.S. 31. In a situation where, as here, all of the circumstances surrounding the admission can be gleaned from the undisputed

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[4] Trial in this case occurred prior to the decision in *Miranda* v. *Arizona*, 384 U.S. 436, and the principles of that decision are therefore inapplicable here. *Johnson* v. *New Jersey*, 384 U.S. 719.

testimony of one witness to whom the statement was made (see *Jackson* v. *Denno*, 378 U.S. at 391) and the record shows that the court was satisfied that the statement was voluntarily given, a general objection that no "predicate" had been established did not require the court to suspend proceedings and conduct a needless hearing outside the jury's presence. Clearly, no harm resulted from the absence of such a hearing. See *United States* v. *Feinberg*, 383 F.2d 60, 70 (C.A. 2), certiorari denied, 389 U.S. 1044. As stated in *Feinberg*, "It is apparent that no end of justice would be served by a slavish adherence to the rule requiring a preliminary hearing." Moreover, in this case the "admission" did not go to the particular crime charged, and the admitted fact was clearly proved by other evidence.

2. The record does not sustain petitioners' claim that government counsel used unfair tactics and made inflammatory remarks during the *voir dire* and closing argument.

a. The court, in the exercise of its discretion, allowed government and defense counsel to pose questions to the panel of prospective jurors. While some of the questions and remarks of government counsel would have been more appropriate if he were making an opening statement to a jury already selected, the fact that these comments were made to the entire panel did not affect petitioners' right to a fair trial. The prosecutor's description of what the evidence might show, made for the purpose of determining whether any members of the panel were sensitive about participating in a case involving illicit sexual

activity, was not prejudicial, especially in view of the fact that the matters described were substantially proved.

b. The remarks alleged to be error in the closing argument were not objected to at trial. Even if an objection had been made, it might properly have been overruled. The closing argument was based upon the sordid facts adduced at trial. While government counsel was highly critical of petitioners' conduct, his closing remarks were no more provocative than the evidence itself. Thus, while petitioners object to the comment by government counsel that Williams was a "pimp," that designation was nothing more than the credible evidence showed him to be. The record shows that the court closely scrutinized counsel's remarks, and, on one occasion, ordered stricken, "out of an abundance of precaution," a comment that if "you turn them loose, you can just as surely sentence Carol Ann McGill to a life of prostitution as you are sitting here."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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